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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MAY DEPARTMENT STORES COMPANY, a Corporation,
Petitioner,

vs.

JOHN REYNOLDS, JR., by JOHN REYNOLDS, Next Friend,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States of America, and the Associate Justices:

The petitioner, May Department Stores Company, a corporation, respectfully shows to the Honorable Court:

STATEMENT OF THE MATTERS INVOLVED.

This is a suit for damages for personal injuries sustained by respondent, a 4-year-old boy, resulting after he had fallen upon an escalator in petitioner's store while he was riding thereon in the care and control of his mother. The suit was instituted in the Circuit Court of the City of St. Louis, Missouri (R. p. 5); on account of diversity of citi-

zenship it was removed to the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri (R. p. 14), and from a verdict and judgment in favor of petitioner, directed by the Court, respondent appealed to the United States Circuit Court of Appeals for the Eighth Circuit, which Court reversed the judgment of the said District Court (R. p. 77). Petition for rehearing was denied (R. p. 87), and petitioner seeks to bring the case here by this petition for writ of certiorari.

I. The Issue Presented.

The issue for decision is whether, under the law of Missouri, with respect to a "standard" instrumentality, such as an escalator (or a revolving door, or an elevator, or any other device commonly employed for use by patrons), and where the instrumentality is so constructed that a small child may possibly be injured thereby, if it should fall, a store owner may be held negligent in connection with a child's injuries suffered while accompanied by a parent familiar with such instrumentality, either (1) for failing to give directions or assistance in connection with the use of such instrumentality, or (2) in the absence of such directions or assistance, for permitting the use of the instrumentality.

The Court of Appeals in this case found that the steps and the handrails of the escalator, due to their height and spacing, were "adapted primarily to adult use," and were not "capable of use by plaintiff," and that by reason of this construction there was a question whether the escalator "presented anticipatable dangers in its use by small children" (R. p. 75), so as to require either an attendant "to assist, caution or give directions to him or to anyone accompanying him," or in the absence thereof that "the use of the escalator might not soundly to have been open to infant invitees" (R. p. 76).

It is the position of petitioner that the decision of the Court of Appeals in ruling that there was a submissible case for a jury on this issue is in conflict with controlling Missouri decisions applicable to the principles involved.

II. The Facts and Proceedings.

Petitioner operates a large department store in the City of St. Louis under the trade name of Famous-Barr Company, and in said store has escalators for the purpose of transporting its business invitees from floor to floor. Respondent's mother had been in petitioner's store upon numerous occasions prior to the date upon which respondent was injured, had used the escalator in question a number of times and was familiar with it (R. pp. 28, 29). She knew that it had been installed to displace an older type of escalator; knew of the height of the steps and was generally familiar with the construction of the escalator. She also knew that as the steps approached the top the height or distance from one step to the other decreased until the steps gradually leveled off (R. pp. 29, 31). On the 17th day of February, 1938, when respondent was 4 years of age, his mother took him to petitioner's store and upon an escalator going to the second floor. She stood upon one of the steps with respondent on the right side, holding his left hand with her right hand. When the step of the escalator upon which respondent and his mother were standing neared the top, and when that step was the second step from the top, and while she was holding him by the hand and was in the act of putting her other hand under his arm and while she was holding onto him, he got away from her hold and fell forward (R. pp. 23, 30). His hands were outstretched before him in such a way that the third, or ring finger, on the right hand was caught in one of the apertures where the tread of the step entered in the comb-plate and was crushed off (R. pp. 33, 34, 36), so that

but a small stump remained with the skin torn away. There was also a deep laceration on the second finger (R. p. 33).

The escalator was so constructed that the teeth of the comb-plate were nine thirty-seconds of an inch in width and had a space of nineteen thirty-seconds of an inch between them. There was a space of over a quarter of an inch between the ends of the teeth or grooves in the moving steps as they passed under the comb-plate. The step, handrails and parts were designed and constructed to accommodate adult persons who would enter the store as business invitees. There were no attendants at either end.

The case was tried on respondent's complaint charging, in substance, that petitioner was negligent in that it knew, or by the exercise of lawful care could have known, that gaps and openings at the upper end of the escalator between the prongs of the comb-plate and moving steps constituted a danger, menace and peril to young children using the escalator, and that the height of the steps and handrails above the steps and the distance between the handrails were not designed or adapted for the safety and needs of small children, and that defendant knew, or should have known, that while said escalator was in such a dangerous condition it was negligence to invite the use thereof by small children. It was also charged that defendant knew, or should have known, that unless it provided some adequate safeguard to protect small children from dangers to them in using said escalator, it was dangerous and perilous for small children to ride thereon, and that, notwithstanding, petitioner did invite the use of the escalator by small children.

At the conclusion of all of the evidence the trial court directed a verdict in favor of petitioner and judgment was accordingly entered (R. p. 66) on October 14, 1940. On

October 17, 1940, respondent's motion for a new trial was filed (R. p. 67). On December 16, 1940, respondent's said motion for a new trial was overruled. From this judgment the respondent appealed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

On April 8, 1942, the United States Circuit Court of Appeals for the Eighth Circuit filed its opinion reversing the said judgment and remanding the cause to the said District Court for a new trial.

In the trial court and in the Circuit Court of Appeals respondent contended that petitioner was negligent in installing an escalator not constructed for and adapted to the use of small children and in permitting small children to use said escalator, which respondent contended was dangerous when used by small children. Petitioner contended that the escalator in question was suitable for the use of such persons as would be reasonably contemplated to enter, and transact business with, department stores; that it was not reasonable to anticipate that children of tender years unaccompanied by parents or attendants would enter department stores; that it was not the presence of the child upon the escalator which caused said injuries, but that they were caused by the child's escape from the control and care of his mother, an occurrence over which petitioner had no control.

On the 21st day of April, 1942, petitioner filed a petition for a rehearing in said Circuit Court of Appeals, wherein it pointed out and complained that the opinion of said Circuit Court of Appeals was erroneous, in that it held that under Missouri law a question of negligence for a jury as to the proximate cause of an injury is presented when a store owner permits a child of tender years, attended by and in charge of a parent, to use an instrumentality of the store which is so constructed as to pos-

sibly permit injury to such child should he make some movement or be so handled by his parent as to cause him to fall and thereby to create a hazard of injury, and that Missouri decisions do not announce any principle of law to support such holding and that such holding conflicted with controlling Missouri decisions. In its said petition for a rehearing petitioner cited cases and decisions of Missouri appellate courts, including the Supreme Court of Missouri, agreeing with petitioner's contention (R. p. 79).

The said petition for rehearing was denied by said Circuit Court of Appeals on the 27th day of April, 1942 (R. p. 87).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The one paramount and impelling reason why a review of the decision of the Court of Appeals should here be accorded is: That decision has so ruled an important question of negligence law, touching upon the relationship of a store-owner and its business invitees, as to depart radically from and to conflict with applicable controlling decisions of the state courts in Missouri.

Briefly to amplify this reason, attention is drawn to the following conflicts between the decision here sought to be reviewed and several leading Missouri decisions:

(1) In holding in effect that it was for a jury to say whether the petitioner was negligent in failing to assist, caution, or give directions to the child or to its parent with respect to the use of the escalator, such opinion is in direct conflict with state decisions which hold that there is no duty to warn where the particular condition which might cause injury is open and obvious;

(2) In holding in effect that it was for a jury to say whether the store-owner was negligent, absent the giving of such warning, in permitting the use of the escalator by a small child when accompanied by a parent, such opinion conflicts with applicable Missouri decisions which hold that the giving of such permission may not be considered as the active, efficient and proximate cause of an injury suffered under comparable circumstances.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 11,932, John Reynolds, Jr., by John Reynolds, next friend, appellant, v. May Department Stores Company, a corporation; appellee, and that the said judgment of the Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

MAY DEPARTMENT STORES COMPANY,
a corporation,

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